Filed 2/3/05 Barnett v. Truong CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

JUANITA BARNETT et al., Plaintiffs and Appellants, v. DUNG S. TRUONG et al., Defendants and Respondents.	B168767 (Los Angeles County Super. Ct. No. BC275695)

APPEAL from a judgment of the Superior Court of Los Angeles County. James C. Chalfant, Judge. Affirmed.

Henson & Henson and Larry D. Henson for Plaintiffs and Appellants.

Law Offices of Mark G. Cunningham and Mark G. Cunningham for Defendant and Respondent Dung S. Truong.

Law Offices of Clinton M. Hodges and Clinton M. Hodges for Defendant and Respondent Martin De Rouen.

In this personal injury action, plaintiff and appellant Juanita Barnett (Barnett) appeals from a judgment following a jury trial in her favor in the amount of $5,000 against defendants and respondents Martin De Rouen (De Rouen) and Dung S. Truong (Truong) erroneously named and sued as Truon So Ding. Barnett contends the inadequate damage award is not supported by substantial evidence, that certain evidentiary rulings were an abuse of discretion, and that the trial court erred when, as to another defendant, it refused to sever or continue the trial.

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The Accident and the Filing of the Complaint

On July 16, 2001, Barnett, along with appellants Heidi and David Colwell (the Colwells), were passengers in a van driven by De Rouen. The van was involved in a collision with a vehicle driven by Truong, and Barnett was injured. As a result of her alleged injuries, on June 13, 2002, Barnett filed the instant action against, inter alia, De Rouen, Truong, and PrimeTime Shuttle (PrimeTime).

Motion to Sever

On February 27, 2003, Barnett and the Colwells sought to sever and stay the action as to any others with an interest in the subject van. PrimeTime had been served with summons and complaint, but had failed to appear. Accordingly, the trial court entered its default.

On the date scheduled for trial, the court reaffirmed its order entering defaults as to PrimeTime and Amrat Inc. as well as a third named and served defendant that allegedly had an ownership interest in the subject van. Barnett and the Colwells asked the trial court to sever their claim against PrimeTime on the grounds that it might have useful documents that they were unable to obtain.

Jury Trial and Motion for New Trial

A jury trial commenced on March 11, 2003. Truong admitted liability, but not causation for all of the damages Barnett alleged were caused by the accident. De Rouen denied liability as well as the extent of the damages Barnett claimed.

Conflicting evidence was presented to the jury regarding Barnett's claimed injuries. While Barnett conceded that she suffered from preexisting injuries, she presented evidence that the accident exacerbated her injuries. In rebuttal, respondents offered voluminous testimony, including expert testimony as well as statements from Barnett herself, regarding Barnett's substantial preexisting, permanent and degenerative injuries and disabilities in her neck and back. They also presented evidence establishing that the accident caused only minor muscle strains of her neck and back.

On March 19, 2003, the jury returned its verdict, awarding the Colwells $250 each and Barnett $5,000. A default judgment of $5,000 was granted against Amrat Inc. doing business as PrimeTime in favor of Barnett.

Following entry of judgment, Barnett and the Colwells moved for a new trial. They argued, inter alia, inadequacy of the damage award and that the trial court erred by (1) denying their request for a continuance and entering a default against the van owner, (2) refusing to admit exhibit 13 (a summary of some of Barnett's medical bills) into evidence, and (3) ruling that only if a medical bill had actually been paid could it be presented as evidence of its reasonableness.

The trial court denied the motion. With respect to the default of the van owner, the trial court found no error "because the defendants were found liable and the only discovery that could have been obtained from Prime Time Shuttle would have dealt with liability issues. [¶] I don't believe that it would have had a significant impact on damages issues, which were really issues concerning the plaintiffs as individuals and their doctor's testimony." As such, the trial court found no error in denying Barnett and the Colwells' request for severance and a trial continuance.

The trial court continued: "Next issue is the medical expenses that were excluded by the court as lacking foundation under [*Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33 (*Pacific Gas & Electricity*)], that they were reasonable and necessary. That is the proper evidentiary ruling." Specifically regarding exhibit 13, the trial court found no agreement between counsel as to its admissibility; thus, it properly was excluded.

As for Barnett's claim of inadequate damages, the trial court determined that "the issue of damages turned in part on the credibility of the plaintiff[]s and in part on the credibility of the expert testimony." After discussing the evidence and the parties' claims with counsel, the trial court summarized: "[U]ltimately I conclude that I cannot say that on pain and suffering where the defense position was that [Barnett] received no aggravation of her preexisting injuries other than a sprain or strain that was resolved in a matter of days or a couple of weeks, that a $5,000 verdict clearly was too low. And so because of that, the inadequacy of damages is not a basis for new trial."

This timely appeal followed on behalf of Barnett and the Colwells.[1]

DISCUSSION

I. *Inadequacy of the Damage Award*

Barnett contends that the damage award is not supported by substantial evidence. Although conceding that she had severe preexisting injury to her lower spine, requiring a cervical fusion, her contention is that the accident exacerbated her condition. Specifically, she posits that she proved that she had suffered significant additional injury

[1] While the Colwells are named appellants, the opening brief concedes that since the testimony relating to the Colwells was disputed, the inadequacy of the damages as to them is not challenged on appeal. Their reply brief asserts that the appeal has not been abandoned as it relates to errors in the admission of evidence as to the Colwells, yet they submit no legal or factual argument supporting how the alleged errors have affected their rights. We deem these issues as having been waived. (*Sprague v. Equifax, Inc.* (1985) 166 Cal.App.3d 1012, 1050.) In any event, as we discuss below, we find no reversible errors.

to the cervical spine, the lumbar spine, a broken wrist, and complications from a discogram performed by her physician after the accident that resulted in a coma and memory loss.

A. Standard of Review

"When considering a claim of insufficient evidence on appeal, we do not reweigh the evidence, but rather determine whether, after resolving all conflicts favorably to the prevailing party, and according the prevailing party the benefit of all reasonable inferences, there is substantial evidence to support the judgment." (*Scott v. Pacific Gas & Electric Co.* (1995) 11 Cal.4th 454, 465.) In reviewing the evidence on appeal, all conflicts must be resolved in favor of the judgment, and we indulge in all legitimate and reasonable inferences to uphold the judgment if possible. When a judgment is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the judgment. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court. (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 571; *Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429.)

The same standard of review applies to damage awards. "It is only in a case where the amount of the award of general damages is so disproportionate to the injuries suffered that the result reached may be said to shock the conscience, that an appellate court will step in and reverse a judgment because of greatly excessive or grossly inadequate general damages." (*Daggett v. Atchison, T. & S. F. Ry. Co.* (1957) 48 Cal.2d 655, 666.) An award of damages must be upheld whenever possible and unless a finding, viewed in light of the entire record is so lacking in evidentiary support as to render it unreasonable, it may not be set aside. *(Huang v. Board of Directors* (1990) 220 Cal.App.3d 1286, 1294; *Westphal v. Wal-Mart Stores, Inc.* (1998) 68 Cal.App.4th 1071, 1078.)

B. The Evidence

Keeping the applicable standard of review in mind, we state the evidence underlying the damage award in the light most favorable to the verdict. (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 614; *Jessup Farms v. Baldwin* (1983) 33 Cal.3d 639, 660.) On the day of the accident, Barnett was taken to the hospital by ambulance and treated. Dr. Richard Rosenberg, an orthopedic surgeon, testified that he reviewed Barnett's medical records and opined that prior to the accident, she was experiencing significant neck and back problems. He noted that her complaints after the accident were consistent with her complaints before the accident. Based on his review of the records, he concluded that Barnett had sustained a muscle strain of the neck and back, and that she had fully recovered.

Similarly, Dr. Stephen Gabriel Rothman, a neuroradiologist, testified that Barnett's 2003 cervical spine MRI depicted the same condition as reflected in an October 1997 MRI.

Even Barnett's testimony did not dispute that her surgery prior to the accident had left her permanently disabled and in severe pain at times. She acknowledged not working since 1998 or 1999, and that she was receiving disability because of her neck and back.

Dr. Chadwick Smith became Barnett's treating physician shortly before trial, and verified that she was suffering from permanent neck problems before the collision. He also noted no damage to the cervical discs as a result of the accident, concluding that Barnett had sustained soft tissue injury.

As to the lumbar spine, Dr. Rothman again found no evidence of trauma. While he did note a small tear of the disc at L4-5, he testified that this was caused by the normal aging process. Dr. Smith once again supported these conclusions, and testified that the accident did not affect the L5-S1 level. This evidence supported respondents' contentions that the accident did not cause a significant change to the cervical or lumbar spine.

Barnett also claims damages based on a non-displaced wrist fracture. The testimony on this injury was disputed. While Dr. Rosenberg stated that the medical records did reveal such an injury, Barnett's experts were unable to offer an opinion on the subject. In light of the conflicting testimony, the jury's decision not to award significant damages for this injury was reasonable.

Finally, Barnett posits that the damages were inadequate because of the complications she experienced after she underwent a procedure known as a discogram, performed by Dr. Thomas. Dr. Thomas testified that the reason he performed this test was to determine whether Barnett's pain was originating in the L4-L5 or L5-S1 disc. In this procedure, dye is injected under pressure in an effort to replicate the pain the patient is experiencing. According to Dr. Thomas, in a small percentage of the cases, a patient may experience a severe complication, as occurred here. Barnett went into a coma and experienced memory problems as a result of the dye leaking to the brain. Dr. Rothman explained that the "leakage" of the dye was not due to the trauma of the accident, and Dr. Rosenberg indicated that since the accident caused only soft tissue injury, the discogram was unrelated to the collision. This is substantial evidence that the discogram was part of Barnett's ongoing medical evaluation, and not related to the accident.

In sum, the evidence supports the award. Although the amount is low, it is not so inadequate, based on the testimony, as to shock the conscience.

II. *Exclusion of the Medical Bills and Exhibit 13*

Barnett seeks a new trial on the grounds that the trial court improperly excluded two pieces of evidence: certain medical bills and a summary of some of Barnett's medical bills, identified at trial as exhibit 13.

A. Standard of Review

We review the trial court's order excluding evidence for abuse of discretion. "'[T]he court's ruling will be upset only if there is a clear showing of an abuse of discretion.' [Citation.] '"The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be

deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court." [Citation.]'" (*Tudor Ranches, Inc. v. State Comp. Ins. Fund* (1998) 65 Cal.App.4th 1422, 1431.)

"Moreover, even where evidence is improperly excluded, the error is not reversible unless '"it is reasonably probable a result more favorable to the appellant would have been reached absent the error."'" (*Tudor Ranches, Inc. v. State Comp. Ins. Fund*, *supra*, 65 Cal.App.4th at pp. 1431-1432; see also *Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1069.)

B. Medical Bills

Barnett contends that the trial court committed reversible error when it refused to allow certain unspecified and unidentified medical bills into evidence. She is mistaken.

Preliminarily, we note that Barnett failed to satisfy her burden on appeal. It is unclear from her briefs what medical bills she sought to introduce and what medical bills the trial court barred her from admitting into evidence. Other than generically referring to "exhibits," Barnett does nothing to identify the specific pieces of evidence she claims should have been presented at trial.

Nevertheless, as Barnett implicitly concedes, if the trial court's interpretation of *Pacific Gas & Electricity* was correct, then this argument fails. We conclude, quite easily, that the trial court was correct.

"An invoice is hearsay, and it is not admissible to prove that the specific work or service appearing on the invoice was actually performed absent a foundational showing of an exception to the hearsay rule." (*In re Leanna W.* (2004) 120 Cal.App.4th 735, 743; see also *Pacific Gas & Electricity*, *supra*, 69 Cal.2d at pp. 42-43 ["Since invoices, bills, and receipts for repairs are hearsay, they are inadmissible independently to prove that liability for the repairs was incurred, that payment was made, or that the charges were reasonable. [Citations.] If, however, a party testifies that he incurred or discharged a liability for repairs, any of these documents may be admitted for the limited purpose of corroborating his testimony [citations]; and if the charges were paid, the testimony and

documents are evidence that the charges were reasonable. [Citations.]"]; *Jones v. Dumrichob* (1998) 63 Cal.App.4th 1258, 1267; *McAllister v. George* (1977) 73 Cal.App.3d 258, 263.)

Here, Barnett has not demonstrated how she laid a proper foundation prior to attempting to introduce the medical bills into evidence. She directs us to nothing in the appellate record that demonstrates that either she or her experts testified as to the amounts of the bills or whether they were in fact paid. Likewise, we see no evidence that anyone testified that the treatments were reasonable and necessary.

To the extent Barnett urges that the trial court misled her into believing that the bills originally were going to be admitted and later changed its mind, no evidence in the appellate record supports this proposition.

C. Exhibit 13

Barnett contends that the trial court erred when it refused to accept into evidence a medical bill summary prepared by counsel for De Rouen. She offered the exhibit in an attempt to prove the amount and reasonableness of her medical expenses, and argues that respondents had stipulated that exhibit 13 was admissible. The record does not support Barnett. Nothing in the record indicates that defense counsel stipulated to its admission as evidence. And unfortunately, Barnett failed to lay a proper foundation for its admission, as she failed to produce any of the bills to support the summary. It is clear from the comments by the trial court that exhibit 13 was not admitted because there was no stipulation regarding admissibility, it was a summary of charges without the underlying bills or invoices, and that Barnett had failed to provide any testimony regarding the reasonableness of the charges.

III. *The Motion to Sever and Stay the Case as to the "Van Interests"*

Barnett argues that the trial court abused its discretion by refusing her request for severance or a trial continuance so that she could pursue the case against the van owner. The decision to sever is left to the sound discretion of the trial court as is the decision whether to continue trial. (Code Civ. Proc., § 1048; *Carpenson v. Najarian* (1967) 254

Cal.App.2d 856, 862; *Estate of Kay* (1947) 30 Cal.2d 215, 225-226; *Schlothan v. Rusalem* (1953) 41 Cal.2d 414, 417 ["The granting or refusal of a continuance is a matter of discretion with the trial court and its ruling will not ordinarily be disturbed"].) That discretion will not be disturbed unless there is a clear abuse resulting in prejudice. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 331.)

Twelve days before trial, Barnett brought an ex parte application for an order to sever so she could proceed against PrimeTime, the entity she believed was the owner of the van De Rouen was driving. Admittedly, she sought the stay in order to perfect her default against the van owner, which she did. She also conceded that her request was not necessary if the defaults of PrimeTime and Amrat, Inc. remained in place. Given that she obtained default judgments against those entities, she cannot demonstrate any prejudice as a result of the trial court's ruling.

Moreover, the van owner was not necessary to decide liability. The liability of the owner was derivative of its driver, De Rouen, who did participate in the proceedings and who the jury did find liable. Barnett's speculation as to what evidence the van owner may have provided fails to demonstrate prejudice. To the extent Barnett contends that she was deprived of a fair trial, as discovery might have revealed evidence to support her damages claim, she fails to demonstrate how anything relevant to damages would have been revealed. Conclusory opinions of counsel that discovery might have aided her case are inadequate. (*In re Marriage of McLaughlin* (2000) 82 Cal.App.4th 327, 337.)

DISPOSITION

The judgment of the trial court is affirmed. Respondents are entitled to costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, Acting P. J.
NOTT

_____, J.
DOI TODD